IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

CHAMBER SUMMONS NO.988 OF 2004
IN
S. C. SUIT NO.2575 OF 1983

Jayant Achyut Sathe & Ors. ..Plaintiffs.
Vs.
Dr. Dara Burjor Joshi
(now deceased ..Defendant.
And
Smt. Margaret Darabsha Joshi & Ors. ..Respondents.
(legal heirs of the Defendant)

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Mr. R.A. Thorat with Mr. Milind Sathaye for the Plaintiffs.
Mr. V.A. Gangal with Ms. Nikita Ajwani for Defendants 1, 2 and 3.

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CORAM: DR. D.Y. CHANDRACHUD, J.
17th November, 2006.

P.C. :

1. The Chamber Summons has been taken out (i) for seeking condonation of a delay of 2610 days in applying for setting aside the abatement of the suit and (ii) for setting aside the abatement of the suit on account of the death of the original Defendant, who expired on 31st January, 1997.

2. The suit was instituted in 1983 for specific performance of an agreement to sell dated 30th December, 1975. The

Defendant expired on 31st January, 1997. Counsel appearing for the Plaintiffs stated before the Court that there is no indication available on the record as it stands at present to establish that the Defendant was served with a writ of summons. Be that as it may, the statement that has been made in the affidavit in support of the Chamber Summons is that after the Plaintiffs executed a general power of attorney in favour of the Applicant to the Chamber Summons on 23rd March, 1999, the Applicant obtained knowledge in December 2000 of the fact that the Defendant had expired on 31st January 1997. The Chamber Summons was instituted on 30th June, 2004. The delay that has taken place – in any event between December 2000 and June 2004 - is sought to be explained by stating that negotiations were commenced with the Respondents to the Chamber Summons and that the Respondents in turn had informed the Applicant that they had executed a general power of attorney in favour of a third party. However, on 28th February, 2001 the Applicant came across a public notice recording that even the said power of attorney had been cancelled. The Applicant was obviously conscious of the fact that on 8th August, 2001 the Respondents entered into a development agreement with a third party and a copy thereof has been annexed

to the affidavit in support of the Chamber Summons. Another important circumstance which emerges from the record is that in the year 2002 the Respondents instituted Special Civil Suit 162 of 2002 in the Civil Court at Nashik seeking a declaration in regard to the invalidity of the agreement to sell dated 30th December, 1975. In the said suit, a written statement was filed on 5th October, 2002 on behalf of the Plaintiffs herein, in which in paragraph 6 it was specifically stated that upon the expiry of the original Defendant in the present proceedings a Chamber Summons had been taken out in this Court for setting aside the abatement. That statement was obviously incorrect because the Chamber Summons was taken out only on 30th June, 2004.

3. Undoubtedly the provisions of Order 22 are procedural in nature and the Court must be guided by the consideration that procedural provisions should not override the mandate of substantial justice (**Sardar Amarjit Singh Kalra v. Pramod Gupta**[1]**).** While this is a settled principle of law which emanates from the judgments of the Supreme Court, the Supreme Court has equally emphasized in later decisions that while the expression

1 2003(4) Bom. C.R. 446-SC..

"sufficient cause" in Rule 9 of Order 22 of the Code of Civil Procedure should receive a liberal construction so as to advance substantial justice, there should be no negligence, inaction or want of bonafides imputable to a party and whether sufficient cause has been shown will depend upon the facts of each case. On the other hand, Courts should not lose sight of the fact that by not taking steps within a stipulated period, valuable rights may have accrued which are likely to be defeated by condoning delay in a routine manner. This principle was adverted to in the judgment of the Supreme Court in **Ram Nath Sao v. Gobardhan Sao**[2] thus :

> "Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time

2 (2002) 3 SCC 195.

> prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner."

4. In the present case, the facts which have emerged before the Court clearly demonstrate negligence, inaction and want of bonafides on the part of the Applicant and the original Plaintiffs. Even it were to be assumed for a moment that the Original Defendant was served with the writ of summons (though as noted earlier counsel appearing for the Plaintiffs fairly stated that there was nothing on the record at present to establish such service) the fact remains that the Plaintiffs obtained knowledge of the death of the Defendant at any event in December 2000. According to the Applicant, negotiations were being held with the Respondents for resolving the dispute. Even if this were to be accepted, it is evident that the Applicants had knowledge of the fact that a development agreement was entered into on 8th August, 2001 by the Respondents, a copy of which the Applicants have themselves annexed to the affidavit in support of the Chamber Summons. Even thereafter when a suit was instituted in the year 2002 by the Respondents for setting aside the agreement to sell dated 30th December, 1975, the Applicant and the Plaintiffs were

aware at least at that stage of all the relevant circumstances. In fact, as noted above, a statement was made in the written statement that a Chamber Summons had already been instituted before this Court which, is positively incorrect, since no such Chamber Summons was filed until 30th June, 2004. Moreover, third party rights have intervened in the meantime. The Respondents have in their affidavit dated 8th August, 2005 stated that a registered agreement of development was entered into on 8th August, 2001 with a third party; that consideration was received in the year 2001 and that a registered sale deed has been executed on 25th February, 2005 in pursuance whereof possession of an area admeasuring 6000 sq. mtrs. has been handed over. Thus, each of the circumstances which have been adverted to in the judgment of the Supreme Court in **Ram Nath Sao** (supra) would warrant a rejection of the Chamber Summons. This is a case where there is

negligence, inaction and a want of bonafides on the part of the Applicant as well as the original Plaintiffs and third party rights have intervened in the meantime. In the circumstances, the exceptions which have been adverted to in the judgment of the Supreme Court clearly exist in the circumstances of the case which

will militate against the condonation of delay and setting aside the abatement. The Chamber Summons is accordingly dismissed.